RTI INTERNATIONAL

Health Information Privacy and Security Collaboration

Interstate Compact Innovation Task

Overview of Task

1. Goal/Product and Purpose of the Interstate Compact Innovation Task:

- To establish a foundational body of knowledge on the concepts that should be included, or considered for inclusion, in an interstate compact addressing consent in the context of electronic health information exchange.

2. The collaborative will:

- Identify and define potential elements and areas for consideration, including the purpose of each element or component.
- Identify various approaches to each element or component, as well as the implications and pros/cons (benefits/risks) of each approach.
- Identify potential challenges and provide analysis related to the feasibility of proposed approaches.

3. The collaborative will not:

- Make any recommendations or advocate for a particular approach/method.

Assumptions

1. Due to the limited time available for the extension project, the specific language for each component of the Compact will not be developed.

2. Each component of the Compact will be researched to identify potential approaches and inform future development of the specific language of the Compact.

3. For clarification purposes, the “Requesting State” is the location where the original request for information is generated. The “Responding State” is the location where the request is received and a reply/action is taken based on the request.

4. An Interstate Compact may be enacted without formal consent of Congress, although Congressional approval may be required if the Compact involves potential federal authority.

5. The intent of the Compact is to:

- ***a.*** Improve access to electronic patient information for permissible purposes where conflicting state laws may impede timely exchange.
- ***b.*** Provide legal protection to Responding States if their laws are more stringent than the laws of the Requesting States.
- ***c.*** Provide an option for states to adopt regarding consent that will preempt inconsistent state laws and therefore not require states to amend their existing laws.

Interstate Compact Development Template

Component, Element, or Area for Consideration: Parties to the Agreement
Purpose and Description of Component, Element or Area for Consideration: Describes the entities that will enter into the interstate compact (agreement). The Council of State Governments defines an interstate compact as "a contract between two or more states." So, literally, the parties to the agreement (i.e., the interstate compact) will be two or more states that agree to its terms. An offer is made when one state, usually by statute, adopts the terms of a compact requiring approval by one or more other states to become effective. Other states accept the offer by adopting identical compact language. Once the required number of states has adopted the pact, the "contract" between them is valid and becomes effective as provided. However, what adoption means from a practical standpoint will vary depending upon the language of the compact itself. For example, the compact may require that each participating state enact its terms, verbatim, as part of the state's statutory law. See, e.g., Ohio Revised Code (R.C.) 109.971 (National Crime Prevention and Privacy Compact); R.C. 921.60 (Pest Control Compact); R.C. 1503.41 (Middle Atlantic Interstate Forest Fire Protection Compact); R.C. 1514.30 (Interstate Mining Compact); R.C. 1522.01 (Great Lakes-St. Lawrence River Basin Water Resources Compact); R.C. 3301.48 (Interstate Compact for Education); R.C. 3747.01 (Midwest Interstate Compact and Commission on Low-level Radioactive Waste); R.C. 3915.16 (Interstate Insurance Product Regulation Compact); R.C. 5103.20 (Interstate Compact for the Placement of Children); R.C. 5119.50 (Interstate Compact on Mental Health); R.C. 5149.21 (Interstate Compact for Adult Offender Supervision). Thus, as a practical matter, each state legislature has an active role in the negotiation and approval of the agreement through the typical legislative process. Alternatively, the compact could be constructed in such a way that the participating states' governors or other designated officials (e.g., head of the state health department)are the signatories to the agreement. See, e.g., R.C. 2151.56 (Interstate Compact on Juveniles); R.C. 5101.141 (authorizing the director of the department of job and family services to enter into interstate compacts for the provision of medical assistance and other social services to children in certain circumstances). With either approach, the compact will ultimately carry the force of statutory law. In Ohio, the General Assembly has typically enacted the language of the compact, and required that the final version be "substantially" the same as the language it has enacted. And, the General Assembly may enact companion statutes at the same time

as part of the legislation. See, e.g., R.C. 3747.02-.03 (related to the Midwest Interstate Compact and Commission on Low-level Radioactive Waste); R.C. 1522.02-.08 (related to the Great-Lakes-St. Lawrence River Basin Water Resources Compact).

Summary of Various Approaches:

In addition to the states who will literally be the parties to the interstate agreement, the parties that will have an interest in its development are many, and include consumers, healthcare providers, health plans, and third-party payers. Indeed, even within state and local government, various agencies represent different constituencies and regulate different aspects of healthcare delivery (e.g., the Ohio Departments of Health, Mental Health, Job and Family Services, and the Bureau of Workers' Compensation), and will need to work together to reach a statewide view regarding the transmission and protection of protected health information.

Naturally, the overriding concern of each of these constituencies will be the facilitation of informed medical care via HIE. But underlying that shared interest, each group has unique interests and concerns regarding the development of an HIE system. Consumers will be particularly concerned with the security of their health information and other confidential data and will want to be assured that those are protected. These concerns are perhaps pronounced more now than ever in the face of growing instances of identity theft and breaches of corporate security that have laid bare the details of individuals' credit accounts.

At the same time, providers will desire immediate access to a patient's entire medical history in order to avoid initiating a course of treatment or prescribing a medication that may be contraindicated by that history. Immediate access will require a system that is capable of high-speed data transfer, unhindered by bureaucratic requirements.

Health plans and third-party payers will want to know what the rules are for the new HIE system, in order that they can comply without fear of civil or criminal penalties as they develop business models and systems that will allow them to engage in HIE.

The various state regulatory agencies will be concerned with enforcing their own existing regulations. For example, the Ohio Department of Job and Family Services will want to ensure that its rules governing the Ohio Medicaid program, including the provision of services and the state-level mandate of consumer confidentiality, are followed and enforced. Concurrently, the Ohio Department of Mental Health has its own regulations of confidentiality mandates that it will want to see enforced, and both agencies may—and likely do—have information to which the Bureau of Workers Compensation would desire access in order to ensure the integrity of its system and avoid fraudulent claims. And, in many cases, each of these state agencies has to work within the framework of federal regulations, including HIPAA, to avoid the risk of federal penalties and/or the loss of federal funding.

Thus, at the earliest stages of interstate compact development, decisions will need to

be made in each state as to how to best accommodate the interests of these various constituencies, even before a broader, multi-state drafting and negotiation effort commences.

With those issues presumably settled, work will then begin to develop the content of the interstate compact itself, perhaps along one of the following tracks:

1. One or more states wishing to enter into an agreement that describes how the state will obtain and implement consent to exchange health information across state lines will name stakeholders within each state who will meet and draft an interstate compact. The states will determine who will lead the group of stakeholders, if any. Once a multi-state stakeholder group is formed, the parties will determine a schedule and deliverables for meeting the goal of drafting an interstate compact that enables health information exchange across state lines.

2. Alternatively, one state may draft a proposed interstate compact to be disseminated to states with whom it wishes to exchange information. The draft agreement will then be negotiated by the interested parties until a final agreement is signed or otherwise approved.

Following the negotiation and agreement among states to the terms of an interstate compact, the federal government may also become a party if Congressional approval is required. *Virginia v. Tennessee*, 148 U.S. 503, 518-522 (1893). The need for such approval is likely if the compact affects the balance of power between the federal government and the states, or if the compact intrudes upon an area reserved or of interest to the federal government.

Implications, Pros/Cons, Benefits/Risks of Each Approach:

1. The first track (i.e., developing a multi-state stakeholder group to develop the compact) may take longer because the initial draft will be worked on by committee. However, if the initial product is developed with the input and buy-in by several states, it will hopefully offset later delays occasioned by individual states' objections to the provisions of the compact.

2. On the other hand, initial development of the compact by having a smaller group (a single state) create the initial draft will likely be quicker on the front end and result in a product to which other parties may then react and suggest changes. The review and revision period using this approach may take longer, but there may be some value in having an actual document earlier in the process to make the interstate compact "more real" to states' executive and legislative leadership.

Potential Challenges and Analysis of Feasibility of Each Approach:

Both approaches are equally challenging in that they require parties to work through a contract negotiation process.

Either approach is feasible assuming willingness on the part of at least two states to negotiate terms.

In any event, resolution of the issue to allow the effective transfer of health and medical information through the creation and approval of an interstate compact will not be immediate. At each step of the process, the concerns and insights offered by the various constituencies identified above will need to be heard and considered in order to ensure effective implementation of the compact.

Comments:

As the discussion above seeks to demonstrate, while the simple answer to the question, "who are the parties to the agreement?" is clear, each state will have to work within itself to determine whose voices matter and should be heard at the negotiating table.

The states will need to be educated on the necessity for and the terms of the compact. To that end, a comprehensive resource kit and other promotional materials, support documents, and internet resources will likely need to be developed. In addition, a national symposium or briefing to education state legislators and other key state officials may need to be convened.

State support will be created through a network of champions (officials, legislators, governors, etc.). Informational testimony will need to be offered to the state legislative committees considering the compact. Then, as each state enacts the compact, focus will need to shift toward transition and implementation of the compact.

Additional support and education efforts will also be required at the federal level if Congressional approval is determined to be required.

References: Council of State Governments, www.csg.org